in the

Supreme Court

of the

United States

No. 78-891

JOSEPH BOMENGO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ENGEL, ARONSON, FRIED & COHN
Attorneys for the Petitioner
1461 N.W. 17th Avenue
Miami, Florida

BY
MAX P. ENGEL, ESQ.

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COMES NOW the Petitioner, JOSEPH BOMENGO, by and through his undersigned attorney and pursuant to Supreme Court Rule 28 petitions this Honorable Court for a Writ of Certiorari in this cause, in support of which he states the following:

1. That Petitioner seeks review of United States -v- Bomengo,____ F.2d ____(dec.9/15/78).

2. That the date of the judgment sought to be reviewed is September 15, 1978.

3. That the Petition For Rehearing of the decision as filed on September 15, 1978, was denied on October 16, 1978.

4. That this Honorable Court possesses jurisdiction in this cause to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. 1254, Section (1).

5. That the question presented for review is the following:

> WHETHER A WARRANTLESS SEARCH OF A DEFENDANT'S APARTMENT, WHICH SEARCH DOES NOT FALL WITHIN ANY OF THE EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT, IS ILLEGAL WHERE STATE OFFICERS ARE ADVISED BY A SECURITY GUARD, FROM WHOM RELIABLE INFORMATION CONCERNING CRIMINAL ACTIVITY HAD BEEN OBTAINED IN THE PAST AND WHO HAD ENTERED THE APARTMENT WITHOUT PERMISSION OF THE DEFENDANT ALLEGEDLY TO SECURE A WATER LEAK, THAT CRIMINAL ACTIVITY WAS TAKING PLACE IN THE APARTMENT AND THE OFFICERS HAD AMPLE OPPORTUNITY TO OBTAIN A SEARCH WARRANT WHICH THEY DID PROCEED TO OBTAIN AFTER PROCEEDING TO THE APARTMENT AND OBSERVING THE ALLEGED CONTRABAND?

6. That the Fourth Amendment to the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

7. That the facts material to the consideration of the question presented are as follows:

On December 6, 1976, the Chief Engineer at the Aventura Condominiums, in Dade County, Florida, one, Arthur Maurer, was walking along the hallway when he observed a wet spot by Apartment No. 2228. Maurer proceeded to knock on the door to said apartment and received no response. He reported the situation to his boss and proceeded to the Biscayne Management Office where all the apartment keys were kept. No key, however, was available to the apartment in question.

Maurer then left a note on the apartment door for the tenant to contact the Security Patrol when he came home so Maurer in turn could go over and get into the apartment to correct the leak.

The following day Maurer came back around 8:00 a.m. and noticed the leak was getting worse. He contacted Biscayne Management and the Assistant Manager there. The Engineer proceeded to notify the

supervisor and tried to get a locksmith to open the door. However, he was unable to get such a locksmith.

His supervisor and the Assistant Manager then instructed Maurer to break the apartment lock and enter the apartment to secure the leak. According to Maurer the leak could have been coming from some other apartment other than the one eventually broken into.

Once inside the apartment, Maurer proceeded to the icemaker which he suspected to be the source of the leak.

He noticed water on the kitchen floor and proceeded to call his porter to help him mop up the water. After the water had been mopped up, Maurer proceeded into the other rooms of the apartment to see if there was any wet rug damage throughout the remainder of the apartment.

While checking for wet rugs, Maurer noticed what he suspected to be narcotics and narcotic paraphernalia. He then called the Mr. Trupp who is the head of security for the apartment.

Trupp proceeded to call the police detectives. Maurer and Trupp proceeded to go throughout the entire apartment and into the bedroom. In the bedroom they observed a gun on the dresser. Furthermore, Trupp proceeded to a closet in the bedroom and observed two automatic weapons with silencers and a shotgun. The detectives then arrived.

The leak from the icemaker was fixed prior to the excursion through the apartment by the engineer and the security guard.

The police arrived and never had a search warrant for the apartment. Detective Lengel of the Dade County Public Safety Department arrived at the place in question and proceeded to knock on the apartment door. Trupp answered the door and invited the officer into the apartment. He then proceeded to the bedroom closet and observed a sawed off shotgun in a brown cardboard box. The officer then left the apartment and returned at a later time after having obtained a search warrant. Said search warrant directed the officer, among other things, to search for and seize illegal firearms. As a result of such search into the closet the officers seized firearms and silencers.

Defendant subsequently was arrested outside the apartment. Thereafter, authorities of the Dade County Public Safety Department contacted Federal authorities. Defendant was subsequently indicted on two counts of Unlawful Possession of A Firearm And Silencer and was subsequently convicted of Unlawful Possession of a Firearm and Silencer. Defendant's convictions were subsequently affirmed by the District Court of Appeal.

8. That this Honorable Court should take jurisdiction of this cause and issue a Writ of Certiorari for the following reasons:

(a) That the Fifth Circuit Court of Appeals in this cause decided an important question of Federal Law

which had not been, but should be, settled by this Honorable Court.

(b) That this Honorable Court has never decided the issue as to what is the threshold point at which private conduct, in coordination with Government conduct ceases to be private conduct and evolves into Government conduct.

(c) That this Honorable Court has never set definitive standards in determining the Government aspect *vel non* of private conduct.

(d) This Honorable Court has never confronted the issue as to when private conduct merely becomes a subterfuge and sham for Government conduct.

9. That the importance of the question raised lies in the fact that the decision of the Fifth Circuit Court of Appeals leaves an individual's privacy subject to invasion by Government authorities through the ruse and sham of "private" conduct.

WHEREFORE, Petition respectfully prays this Honorable Court issue a Writ of Certiorari to the Fifth Circuit Court of Appeals and order Petitioner's conviction be reversed.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certorari was mailed to the United States Attorney's Office, 300 Ainsley Building, Miami, Florida, and the Solicitor General's Office, Washington D.C., this____day of _____, 1978.

ENGEL, ARONSON,
FRIED & COHN
Attorneys for the Petitioner
1461 N.W. 17th Avenue
Miami, Florida

BY Max P. Engel
MAX P. ENGEL, ESQ.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph BOMENGO, a/k/a Joe Russo,
Defendant-Appellant.

No. 77-5805.

United States Court of Appeals,
Fifth Circuit.

Sept. 15, 1978.

Defendant was convicted in the United States District Court for the Southern District of Florida, James Lawrence King, J., of possession of two unregistered and improperly marked firearm silencers, and he appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) an initial search of defendant's apartment by the chief engineer of the apartment complex, who had obtained entry in order to locate the source of a water leak, did not involve state action, and (2) where detective, who was called to the scene by the person who assisted the chief engineer, strictly confined his view to the scope of the initial discovery, and then left to procure a search warrant, no "search" within the ambit of the Fourth Amendment took place.

Affirmed.

1. Searches and Seizures — 7(4)

Fourth Amendment proscribes only governmental actions; search by private individual for purely private reasons does not raise Fourth Amendment implications. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures — 7(4)

That security director of apartment complex had formerly been employed as police officer and had previously supplied detectives with reliable information regarding criminal activity did not mean that there was "state action" in his and engineer's obtaining entrance to defendant's apartment in attempt to locate source of water leakage after attempts to locate occupants of apartment were unsuccessful; entry into apartment was effected by private persons for nonofficial purposes and was outside bounds of Fourth Amendment. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

3. Searches and Seizures — 1

Police view subsequent to search conducted by private citizens does not constitute "search" within meaning of Fourth Amendment so long as view is confined to scope and product of initial search. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. Searches and Seizures — 7(24)

Where chief engineer and security director of apartment complex, after unsuccessfully attempting to locate occupants of apartment from which water was observed leaking, and after obtaining entry to apartment in order to locate source of leak, inadvertently noted that doors of den closet were ajar and that two handguns with attached silencers, in plain view, were inside closet, where police were then called, and where, upon arrival, detective was led directly to closet where handguns with silencers were located, and merely looked at silencers through open closet door, but then left to procure search warrant, there was no "search" within ambit of Fourth Amendment; police view was confined strictly to scope of initial discovery. U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the Southern District of Florida.

Before COLEMAN, GEE and HILL, Circuit Judges.

COLEMAN, Circuit Judge.

Joseph Bomengo was charged in a two-count indictment with the possession of two unregistered and improperly marked firearm silencers in violation of 26 U.S.C. §§ 5861(d), 5861(i), and 5871. A jury convicted him on both counts. We affirm.

On appeal Bomengo contends that the trial court committed reversible error in denying his suppression motion, by denying his motions for judgment of acquittal, and by giving an erroneous jury instruction. A

thorough examination of the issues reveals that with the exception of the claimed denial of defendant's motion to suppress, Bomengo's claims of error are clearly without merit, so we discuss only the suppression point.

I

Throughout the evening of December 6, 1976, the chief engineer (Maurer) at Coronado Towers, a segment of the Aventura Apartment complex, noticed water leakage outside Bomengo's apartment.[1] Meanwhile, attempts were made, unsuccessfully, to locate the apartment occupants. On the morning of December 7, in an attempt to locate the source of the leak, and stop it, Maurer forced open the front door and entered the apartment. Maurer then called the security director (Trupp) of the apartment complex, and asked him to come to the apartment. Both men inspected the apartment to determine the severity of the water damage and to insure that there were no ill or disabled persons inside. The security director noted that the louver doors of a den closet were ajar and that two handguns with attached silencers, in plain view, were inside the closet.

At this point, the security director telephoned Detective Robert Lengel of the Dade County Public Safety Department and requested that he come to the scene. When Lengel arrived at Bomengo's apartment he knocked at the front door. Trupp invited Lengel in and

[1]This apartment was leased by Helen Young, leasing agent, to Bomengo, using the alias "Joe Russo", and to his friend, Bernard Bollender, using the alias "Al Monaco". Although Monaco signed the lease, Bomengo stated that he would be the one staying in the leased apartment.

directed him to the den closet. The closet door was still ajar. Lengel saw two silencers. Without touching or moving the silencers, Lengel left forthwith and proceeded to obtain a search warrant.

II

The defendant now argues that the trial court erred in failing to suppress the physical silencers seized pursuant to the search warrant, which, in turn had issued pursuant to what the private individuals had first observed.

[1, 2] The Fourth Amendment proscribes only governmental action. A search by a private individual for purely private reasons does not raise Fourth Amendment implications. *See, e. g., Burdeau v. McDowell,* 256 U.S. 465, 475-76, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *United States v. McDaniel,* 5 Cir., 1978, 574 F.2d 1224, 1226 (and cases cited therein). There is no doubt that the initial entry into the apartment was effected by private persons for non-official purposes. That, of course, was outside the bounds of the Fourth Amendment, *see United States v. Mekjian,* 5 Cir., 1975, 505 F.2d 1320, 1327. Indeed, the government first learned of what had been seen in plain view only after that occurrence had taken place. Neither Maurer nor Trupp acted as an "instrument" or "agent" of the government, *see Coolidge v. New Hampshire,* 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The defendant's suggestion at oral argument that there was state action in the initial search because of Trupp's former employment as a police officer and because he previously had supplied Detective Lengel with reliable information regarding criminal activity, is without merit. *See, e. g., Burdeau, supra,* (private detective); *United States v. Francoeur,* 5 Cir., 1977, 547 F.2d 891 (security guard); *United States v. Valen,* 3 Cir., 1973, 479 F.2d 467, 469 (airline employee paid for supplying police with information).

Nonetheless, the defendant argues that the subsequent view by Detective Lengel constituted a warrantless search in violation of the Fourth Amendment. On the other hand, the government contends that there was no "search" by Lengel which would raise Fourth Amendment implications. We agree.[2]

[3] We have long recognized that a police view subsequent to a search conducted by private citizens does not constitute a "search" within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search.

In *Barnes v. United States,* 5 Cir., 1967, 373 F.2d 517, a motel owner searched a travel bag left behind by a defendant. Subsequently, the motel owner notified the police that he had discovered suspicious checks inside the bag. The police then examined the contents of the bag. We held that there was no governmental search within the ambit of the Fourth Amendment.

In *United States v. Blanton,* 5 Cir., 1973, 479 F.2d 327, and recently in *United States v. McDaniel, supra,* we rejected the argument that for Fourth Amendment purposes a governmental view subsequent to a private

[2]Therefore, it is unnecessary to decide whether the police view here would fall within one of the exceptions to the Fourth Amendment requirement that there be a search warrant.

search constituted a "new search". In both cases airline employees opened unidentifiable, unclaimed baggage in an effort to determine ownership. In *Blanton* the defendant's baggage was found to contain a gun with a silencer. In *McDaniel* firearms and narcotics were discovered. In both cases the bags were resealed and federal officers were notified of the discovery. The officers then reopened the bags. We held in both cases that the initial search was valid because it was conducted by private citizens and that the subsequent view by the officers did not constitute a "separate or additional search", 574 F.2d at 1226; 479 F.2d at 328. That the officers were required to reopen the baggage in order to inspect the contents was, under the circumstances, of no legal significance.

The defendant seeks to distinguish *Barnes*, *Blanton*, and *McDaniel* on the ground that the police view of the silencers here took place in Bomengo's apartment instead of in a public area such as the boilerroom. This argument fails because in *Barnes*, *Blanton*, and *McDaniel* we were concerned with whether the government had impermissibly invaded the defendant's reasonable expectation of privacy.

This case turns on the fact that the efforts of the apartment employees to deal with the leaking water were not illegal and were a reasonably foreseeable intrusion of privacy. Water was seen outside the defendant's apartment. This indicated that there might be water damage inside the apartment which could, in turn, leak into the apartments below. After making a reasonable effort, for approximately twelve hours, to locate the occupants of the apartment, the chief engineer gained entrance into the apartment. After securing the source of

the water leakage, Maurer with the assistance of Trupp, the security director, examined the apartment to determine the severity of the water damage. In addition, both employees knew that the apartment was occupied. Unable to contact the occupants, however, Maurer and Trupp sought to determine whether they might be ill or disabled. During the course of this effort they inadvertently discovered the silencers, in open sight.

Detective Lengel came to Bomengo's apartment at Trupp's request. Upon arrival, Lengel knocked on the front door of the apartment and was admitted. Trupp led Lengel directly to the closet where the handguns with silencers were located. Lengel merely looked at the silencers through the open closet door. He then left to procure a search warrant.

With these facts in mind, *see Eisentrager v. Hocker*, 9 Cir., 1971, 450 F.2d 490, 492 (landlady invited police into defendant's apartment to view a corpse she had discovered). *See, also, United States v. Brand*, 5 Cir., 1977, 556 F.2d 1312 (once the privacy interest has legally been invaded, to the extent of that invasion the citizen has lost his reasonable expectation of privacy).

[4] It is clear that the police view was confined strictly to the scope of the initial discovery. Before the silencers were seized a warrant was obtained. We conclude, therefore, that no search within the ambit of the Fourth Amendment took place.

Accordingly, the judgment of the District Court is

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5805

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH BOMENGO, a/k/a
Joe Russo,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(October 16, 1978)

Before COLEMAN, GEE and HILL, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

Jas. P. Coleman
United States Circuit Judge